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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1085

SAMUEL SALVADORE PERNICIARO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition of Samuel Salvadore Perniciaro for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and brief in support thereof.

HUGH M. WILKINSON,
JOHN D. LAMBERT,
HUGH M. WILKINSON, JR.,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

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Petition of Samuel Salvadore Perniciaro for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and brief in support thereof.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, SAMUEL SALVADORE PERNICIARO, a citizen of the United States, domiciled in the State of Louisiana, respectfully brings this, his application for a *writ of certiorari*, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

Petitioner was convicted on April 3, 1946, in the District Court for the Eastern District of Louisiana

of violating the Selective Service Act. C. 720, par. 11, 54 Stat. 894; Title 50, App. U.S.C.A. Section 311. He was found guilty on the last count of an eight count indictment. Sentence was imposed on April 5, 1946, petitioner being condemned to serve four (4) years in a United States penitentiary.

Petitioner thereupon took his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming his conviction on December 30, 1946. Petitioner, within the delays allowed by law, filed his petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit, which petition for rehearing was denied on February 3, 1947 with no written opinion rendered. On February 6, 1947, a stay of mandate was ordered by the said United States Circuit Court of Appeals for the Fifth Circuit, for a period of thirty (30) days, exclusive of Sundays and holidays, from February 3rd, 1947, to enable petitioner to apply to this Honorable Court for a *writ of certiorari* to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

STATUTE INVOLVED

The statute under which defendant was convicted is Section 11 of the Selective Training and Service Act, reading as follows:

> **"Offenses and punishment.** Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, any person charged

with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or

> unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act." Sept. 16, 1940, c. 720, par. 11, 54 Stat. 894; Title 50, App. U.S.C.A. par 311.

The regulation of the National Director of Selective Service which created the alleged duty on the part of defendant, for the failure of which to perform he must spend the next four years in a federal penitentiary, reads as follows:

> "Section 626.1.
>
> "(b) Each classified registrant shall, within ten days after it occurs, and any other person should, within ten days after knowledge thereof, refer to the local Board in writing any fact that might result in such registrant being placed in a different classification."

Paragraph (b) of Section 621.1 was amended by Amendment No. 325 (10 FR 9210) effective July 23, 1945, but the above regulation was in effect at the time of the alleged crime. Further, the amendment made no change affecting the issue we present here.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under paragraph (a) Section 240 of the Judicial Code as amended (Section 347, Title 28 U.S.C.A.), making it competent for this Court to review by *certiorari* any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7,

1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner, Samuel Salvadore Perniciaro, was indicted jointly with Frank Walter Mogall by an indictment dated July 26, 1945 and returned by a grand jury empaneled and duly qualified in the Eastern District of Louisiana.

There were eight counts to the indictment. Both defendants were found not guilty on the first seven counts but were found guilty in the eighth.

The first count charged a conspiracy on the part of the two defendants to prevent Perniciaro's being drafted into the armed forces through the medium of keeping him classified as an essential worker in the shipbuilding industry. Mogall was the Superintendent of the pipe factory of the Delta Shipbuilding Co., and the recital was that pursuant to the alleged conspiracy he sent, or caused to be sent, certain communications to Local Board Number 8, and otherwise protected Perniciaro's status within the plant from certain foremen who reported Perniciaro for failure to work. Both were acquitted on this count.

Count two charged the substantive crime that both had violated the criminal provisions of the Selective Service Act and regulations thereunder in that they had, on February 22, 1943, written or caused to be written certain false statements to the Selective Service Local Board Number 8 concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count three charged that both defendants had caused to be presented to Local Board Number 8 in the same document further false statements. Both defendants were acquitted under this count.

Count four charged the causing to be rendered to the same Local Board Number 8 further false statements in a certificate dated May 6, 1943 and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count five charged the causing to be rendered to Local Board Number 8 further false statements in a certificate dated October 28, 1943, and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count six charged the defendants with causing to be made to Local Board Number 8 a false certificate dated April 11, 1944, and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count seven charged the defendants with causing to be made to Local Board Number 8 a false certificate dated October 16, 1944, and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count eight charged that each defendant committed a crime under the Selective Training and Service Act in that each did not report certain facts to Local Board Number 8 which would have resulted in Perniciaro being placed in a different classification. They were both convicted under this count.

The facts essential to an approach to the legal issues of this petition are these:

Samuel Salvadore Perniciaro was an employee of the Delta Shipbuilding Company, Inc., being (from the official records) employed the entire time as a pipe fitter and employee of the pipe department. Frank Walter Mogall was the superintendent of said plant. The government admitted that Perniciaro came through the gate every morning and stayed there throughout the day. He was officially employed and physically present during the entire time embraced by **all counts** of the indictment. The government's case rests on the allegations that Perniciaro "actually did not work but loafed and slept on the job."

The conviction was not for conspiracy. That was count one under which there was an acquittal. Likewise both defendants were acquitted of uttering or causing to be uttered false statements to the Local Board Number 8.

QUESTION PRESENTED

The specific crime under which the defendants were convicted was that each, in his own individual capacity, had a duty to report a change in Perniciaro's status and having failed to so do accomplished, each one, his individual crime.

This petition raises the specific issue of whether the statute and regulation actually create and adequately define the crime with which Samuel Salvadore Perniciaro was charged and stands convicted; and secondly, whether the constitution of the United States allows such a state of facts to constitute the crime purportedly created and

defined, providing the statute and regulations do say what the District Court and the Circuit Court have interpreted them to say.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a *writ of certiorari* are:

1. Count eight of the indictment, in charging that Perniciaro did not report to Local Board Number 8 the fact that he was "loafing" and "sleeping on the job", charged no crime known to the laws of the United States, and his conviction thereunder deprived him of due process of law contrary to the Constitution of the United States; and

2. That if Section 11 of the Selective Training and Service Act, supplemented by Section 626.1 (b) of the Regulations of the National Director of Selective Service, does purport to create a crime the essentials of which are a failure by a deferred civilian worker to report to the Local Board the fact that while officially employed and physically present in an essential industry he was not working to the utmost of his capacity or was outrightly loafing, then the Section and the regulation are null and void and unconstitutional and should be so declared by this Honorable Court for failure to create a definite and certain standard.

The Act of the Congress says nothing of a duty to report a change in status. It is the regulation of the Director of Selective Service which creates such a duty. So our issue is, first, does the regulation actually create a duty of a worker to report his own loafing; and, secondly, does not such a law violate the Constitution as having too vague, uncertain and indefinite a standard.

TRANSCRIPT ANNEXED

The record having been printed for the use of the Court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioner has filed herewith the copies of said record as printed below, together with the proceedings and opinion in this Honorable Circuit Court of Appeals for the Fifth Circuit, and due certification thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioner also files herewith and makes part of this application his brief in support thereof.

PRAYER

WHEREFORE, petitioner Samuel Salvadore Perniciaro respectfully prays that a *writ of certiorari* may issue to the Honorable the United States Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders proper in the premises; and for all such relief as the nature of the case may justify.

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Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

We will deal with only one issue and endeavor to be as concise as possible, in accordance with paragraph 2 of Rule 38 of this Court.

The question we present is that count eight of the indictment was and is invalid on its face, in so far as it includes the defendant Samuel Salvadore Perniciaro, in that it charges no crime known to the laws of the United States; and that if the acts charged are claimed to be a crime under any law of the United States, then such law is invalid and should be so declared by this Court as furnishing too vague, too indefinite and too uncertain a standard of guilt.

THE STATUTE

Section 11 of the Selective Training and Service Act (Section 311, Title 50 App. U.S.C.A.) describes no crime consisting of a failure of a deferred worker to report inattention to duty or any degree of laziness on a job. Nowhere in the Act is such a crime described. Section 5 (k) of the Act (Section 305 (k), Title 50, App. U.S.C.A.) merely says that should a deferred employee leave the occupation under which he is deferred, then the local board shall reclassify him as available for military duty. Section 11 is a general penalty section covering any failure to comply with the specific duties created under the Act.

Therefore, Congress did not create a crime consisting of the elements of a deferred worker not report-

ing to the local board the fact that while reporting daily to the job under which he was deferred he was loafing on the job. And it is understandable why such a provision was not included, for the normal process would be for the representative of the employer to fire such a worker.

The first count charged a conspiracy between the co-defendants, but they were acquitted of any conspiracy.

THE REGULATION

The question then follows as to whether the Regulations of the National Director of Selective Service purport to create, where the statute does not, a crime consisting of a deferred worker not reporting to his local board the fact that, while reporting to work each morning and remaining on the premises all day, he was loafing on the job.

The only regulation approaching this question presently reads as follows:

> **"Section 626.1**
>
> (a) No classification is permanent.
>
> (b) Each classified registrant and each person who has filed his request for the registrant's deferment shall, within ten days after it occurs **refer to the local Board in writing any fact that might result in the registrant being placed in a different classification.** Any other person should, within ten days after knowledge thereof, refer to the local Board in writing any such fact.
>
> (c) The local Board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined. Members may be requested

to furnish information; police officials or other agencies may be requested to make investigations, and other steps may be taken by the Board to keep currently informed concerning the status of classified registrants." (Emphasis ours)

During the entire time covered by the facts charged in the indictment Section 626.1 (b) read as follows:

"Section 626.1

(b) **Each classified registrant shall, within ten days after it occurs,** and any other person should, within ten days after knowledge thereof, **refer to the local Board in writing any fact that might result in such registrant being placed in a different classification.**" (Emphasis ours)

Paragraph (b) of Section 621.1 was amended as above by amendment No. 325 (10 FR 9210), effective July 23, 1945.

Now, under the Act as passed by Congress, the fact that Perniciaro was guilty of even a greater or possibly a lesser degree of loafing on an essential job would not have been in itself a "fact that might result in such registrant being placed in a different classification." Section 5 (k) of the Statute says that should a "person **leave** such occupation or endeavor * * * his selective service local board * * * shall reclassify such registrant in a class immediately available for military service. * * * "

The conclusion is sound that neither the statute nor the regulation placed a duty on a deferred worker to report to his local board the fact that he was loafing to any degree or even completely loafing. The Statute and the regulation leave that duty where it belongs—

on the employer—and the obvious course was for the employer to fire such an employee which act of dismissal would put said employee under an instantaneous duty to report such fact to the local board.

THE STATUTE OR REGULATION UNCONSTITUTIONAL IF CONSTRUED TO CREATE THIS CRIME

This regulation 626.1 was before the Circuit Court of Appeals for the Fifth Circuit on a prior occasion wherein it was argued that the duty of reporting a change in status was too vague, uncertain and indefinite a standard and that the regulation was therefore unconstitutional under the Sixth Amendment to the Constitution of the United States. *Stassi v. United States*, 152 F. (2) 581 (1945). That was the case of a man who **did not report for work at all** and the Circuit Court held that such was a "fact that might result in such registrant being placed in a different classification."

The result in the *Stassi* case can logically be said to be within the scope of Section 5 (k) of the statute, for to remain away from the premises of the employment in which deferred, that is, actual absenteeism, would constitute a deferred worker **leaving** "the occupation under which he is deferred."

But Perniciaro reported for work every day. Accepting count eight of the indictment on its face and admitting, for purposes of attacking that count on its face, that all facts are true, Perniciaro was there all day each working day but, in the language of count eight of this indictment pretended to work, "did not actually perform any useful work in support of the

war effort, but merely checked in and out, and during the hours which the records of the Delta Shipbuilding Company, Inc. show that he ostensibly worked, he actually did not work but loafed and slept on the job and disappeared during working hours practically all of the time during the hours for which he was paid by said Delta Shipbuilding Company, Inc., for apparent work at the plant from June 15, 1942 to January 31, 1945."

Perniciaro did not leave his deferred occupation. At the worst, according to the crime charged, he loafed. There was then and is now no crime in failing to report to the local board your own personal loafing, whatever be its degree, under the laws of the United States.

VAGUE, INDEFINITE AND UNCERTAIN

If it be decided that Regulation 626.1 purports to encompass the situation of the loafing and put on a deferred worker the burden of reporting his own loafing to his local board, then the regulation is unconstitutional as being vague, indefinite and uncertain. For the degree of loafing is indefinite and uncertain. A man is lazy and neglects 5% of his work. Another neglects 10%. And so on down the line until you have a man reporting for work and doing nothing but standing around all day long. Under the charges of count eight Perniciaro is somewhere along this line. At what percentage of loafing did it become a crime for him not to report his loafing to the local board? There is no certain standard to the regulation if it be so applied and it would violate the constitutional rights of this defendant Perniciaro.

If the regulation purports to cover the situation

charged in count eight, this Honorable Court should declare it invalid and unconstitutional and discharge the defendant Perniciaro. If it does not purport to cover the situation, the defendant Perniciaro should be ordered discharged and released as having been convicted and sentenced for a crime which does not exist under the laws of the United States.

Respectfully submitted,

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